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APPENDIX A

OPE SHIPPING, LTD. and El Porvenir Shipping Company, Inc., Plaintiffs-Appellants,

v.

ALLSTATE INSURANCE COMPANY, INC., United States Fidelity & Guaranty Companies, Inc., Various British Underwriters and Underwriters at Lloyds, Defendants-Appellees.

VADOR SHIPPING, LTD., and Cia. de Navegacion La Libertad, S.A., Plaintiffs-Appellants,

v.

ALLSTATE INSURANCE COMPANY, INC., United States Fidelity & Guaranty Companies, Inc., Various British Underwriters and Underwriters at Lloyds, Defendants-Appellees.

AGUA SHIPPING, LTD., and Cia. De Navegacion Corinto, S.A., Plaintiffs-Appellants,

v.

ALLSTATE INSURANCE COMPANY, INC., United States Fidelity and Guaranty Companies, Inc., Various British Underwriters and Underwriters at Lloyds, Defendants-Appellees.

DURAS SHIPPING, LTD., and Nicaraguense, S.A., Plaintiffs-Appellants,

v.

ALLSTATE INSURANCE COMPANY, INC., UNITED STATES FIDELITY & GUARANTY COMPANIES, INC., VARIOUS BRITISH UNDERWRITERS AND UNDERWRITERS AT LLOYDS, DEFENDANTS-APPELLEES.

No. 693, Docket 81-7701.

United States Court of Appeals, Second Circuit.

Argued Feb. 22, 1982.

Decided Aug. 30, 1982

Joseph F. De May, Jr. New York City (Victor S. Cichanowicz, Alfred F. Koller, Jr., and Cichanowicz & Callan, New York City, on the brief), for plaintiffs-appellants.

Michael J. Ryan, New York City (Frank H. Loomis and Hill, Betts & Nash, New York City, on the brief), for defendants-appellees Marine Risk Underwriters.

Brendan J. Connolly, New York City (Mendes & Mount, New York City, on the brief), for defendants-appellees War Risk Underwriters.

Before WATERMAN, VAN GRAAFEILAND and MESKILL, Circuit Judges.

VAN GRAAFEILAND, Circuit Judge:

Plaintiffs appeal from orders and a judgment of the United States District Court for the Southern District of New York, 521 F.Supp. 342, Pollack, J., denying them recovery of the insured value of four ships. We affirm in part and reverse in part.

In June, 1979, the *El Salvdaor*, the *Hope*, the *Managua* and the *Honduras* were owned respectively by three Panamanian corporations and one Nicaraguan corporation, all apparently under the control of General Anastasio Somoza. The ships were registered under the Nicaraguan flag. The four vessels were lost to their owners during the 1979 Nicaraguan revolution which resulted in the overthrow of the Somoza government by Sandinista forces. The chronology of events leading to the demise of the Somoza regime is set forth in the opinion of the court below, reported in 521 F.Supp. at 342.

On June 17, 1979, the *Hope* was taken over by four armed crew members who identified themselves as Sandinistas and ordered the ship's captain to proceed to Cuba. In Puerto Nuevita, Cuba, Cuban authorities came aboard the *Hope* and sailed it to Mariel, Cuba, where it remained until it was returned to Nicaragua.

On June 22, the *El Salvador* was removed from the Canal Zone to Panamanian waters while its captain was ashore. The chief mate stated that five armed crew members, who identified

themselves as Sandinistas, ordered the transfer and hoisted the Sandinista flag. The Panamanian Maritime National Guard took control of the ship. The *Honduras* and the *Managua* suffered similar fates around June 22. The *Honduras* was taken from the Canal Zone into Panamanian waters, while the *Managua* slipped out of El Salvador in contravention of orders and also was taken to Panama.

On June 24 and 28, 1979, Somoza informed his longtime business associate Joseph Baittiner about the fate of the ships. At Somoza's request, Baittiner then undertook to transfer title of the ships to Cayman Islands corporations. On July 9, papers were executed for the transfer of the *Hope* from El Porvenir Shipping Co., Inc. to OPE Shipping, Ltd., the *El Salvador* from Cia. de Navegacion La Libertad, S.A., to Vador Shipping, Ltd., the *Honduras* from Marine Mercante Nicaraguense, S.A. to Duras Shipping, Ltd. and the *Managua* from Cia. de Navegacion Corinto, S.A. to Agua Shipping, Ltd.

On or before July 10, the marine risk coverage on the ships was cancelled, either for non-payment of premiums or because of the change in ownership. On July 11, the war risk insurers authorized the assignment of their policy to the Cayman Islands corporations. On July 13, the vessels were registered under the British flag in the Cayman Islands.

The ships remained in Cuba and Panama until after the Sandinistas gained complete control of the Nicaraguan government. The vessels were returned to Nicaragua in August, 1979, and on September 28, 1979, plaintiffs sued in the court below to recover their insured value.

In the summer of 1980, the Empresa Nacional de Puertos, an agency of the Sandinista government, commenced actions in the First District Court of Managua, Nicaragua, to recover port charges for the four ships which had accrued while they were laid up in Corinto, Nicaragua. The ships were attached pursant to judicial orders, and, following the entry of judgments, were offered for sale at public auction and purchased by Empresa for the amount of the charges owed.

Plaintiffs claimed that their losses were covered by both the marine risk and war risk policies. The district court held that they were covered by neither. For the reasons discussed below, we affirm as to the marine risk but reverse as to the war risk.

THE MARINE RISK POLICIES

At the time the ships were diverted from their courses, the marine risk insurance was in effect. The marine policy covered loss due to barratry of the master and mariners and other like perils, but specifically excluded loss resulting from civil war, revolution, rebellion, insurrection or civil strife arising therefrom, hostilities or warlike operations, whether or not there was a declaration of war.

Barratry has been defined as "an act committed by the master or mariners of a ship, for some unlawful or fraudulent purpose, contrary to their duty to their owners, whereby the latter sustain an injury." *Marcardier v. Chesapeake Insurance Co.*, 12 U.S. (8 Cranch) 39, 49, 3 L.Ed. 48 (1814). It consists of serious misconduct or dishonest breach of trust resulting in prejudice to the owner, Gilmore and Black, *The Law of Admiralty* 73 (2d ed. 1975); *Couch on Insurance 2d* § 43:38 (1963), and may take place even though the disobedient crew or master did not act with an intent to derive personal benefit from the wrongful act, *id.* § 43:39.

There can be little question that the four crews were guilty of barratrous conduct. Uncontradicted testimony established that they forced the masters to relinquish control of their ships and then sailed to the vessels to the waters of nations hostile to Somoza and friendly to the Sandinista cause. These actions were in clear derogation of the crews' duties to shipowners.

However, because of the policy exclusions, the barratrous acts cannot be viewed in isolation without consideration being given to causative and motivative factors. When ascertaining the legal cause of loss for insurance purposes, a court must look to the "real efficient cause" of the occurrence rather than the single

cause nearest in time to the loss. *Blaine Richards & Co. v. Marine Idemnity Insurance Co.*, 635 F.2d 1051, 1054 (2d Cir. 1980) (quoting *Lanasa Fruit Steamship & Importing Co. v. Universal Insurance Co.*, 302 U.S. 556, 565, 58 S.Ct. 371, 375, 82 L.Ed. 422 (1938)). Determination of proximate cause is a matter of "applying common sense and reasonable judgment as to the source of the loss alleged." *Blaine Richards & Co. v. Marine Indemnity Insurance Co., supra*, 635 F.2d at 1054–55. From a common sense standpoint, it is quite obvious that the unlawful conduct of the four crews was a direct result of the Nicaraguan civil war. The barratrous mariners took control of the ships in the name of the Sandinistas, professed to be acting under orders from the Sandinista regime and, in at least one case, hoisted the Sandinista flag over the ship. The commandeered vessels were taken into the waters of nations known to be friendly to the revolutionary cause and were returned to Nicaragua only after Somoza was ousted and the Sandinistas were in control. Moreover, it is evident, from the concerted nature of the activities, that the seamen acted under orders from a central atuhority. The district court did not err, therefore, in holding that the conduct of the crews fell squarely within the exclusions of the marine policy so as to relieve the marine underwriters from liability.

THE WAR RISK POLICY

The war risk policy complemented the marine risk policy by providing coverage for the risks excluded from coverage in the latter policy under the "War, Strike and Related Exclusions" clause. At first blish, therefore, it would seem that the very facts which relieved the marine underwriters from liability imposed liability upon the war risk underwriters. However, the war risk underwriters argued successfully below that they, too, were relieved of liability, because their own policy excluded coverage for losses due to "[c]apture, seizure, arrest, restraint, detainment, or confiscation by the Government . . . of the country in which the Vessel is owned or registered." We believe the district court should have rejected this argument.

Prior to July 9, 1979, title to the *El Salvador*, the *Hope*, and the *Managua* was, in each case, in a Panamanian corporation. Although the stock of these corporations may have been substantially or wholly owned by Somoza, under "generally applicable principles", *Fisser v. International Bank*, 282 F.2d 231, 238 (2d Cir. 1960) that fact, standing alone, did not warrant the court in piercing the corporate veils so as to place ownership of the vessels in Somoza and thus in the Country of Nicaragua. *Lehigh Valley Industries, Inc. v Birenbaum*, 527 F.2d 87, 94 (2d Cir. 1975); *Zubik v. Zubik*, 384 F.2d 267, 272,74 (3rd Cir. 1967). The defendants insured the corporations as owners and were paid for so doing. In the absence of a finding that such fraud or misrepresentation was perpetrated on the defendants as would make it inequitable to hold them to the terms of their contracts, the district court should not have disregarded the corporate existence and titles. *Lehigh Valley Industries, Inc. v Birenbaum, supra*, 527 F.2d at 94–95; *Brunswick Corp. v. Waxman*, 599 F.2d 34, 36 (2d Cir. 1979); *Hellenic Lines Ltd. v. Winkler*, 249 F. Supp. 771, 777–78 (S.D.N.Y. 1966). The district court erred, therefore, in holding that Nicaragua was the country of ownership of the *El Salvador*, the *Hope*, and the *Managua*, within the meaning of the war risk policy.

Exhibit No. 17, received in evidence curing the trial, shows that the Nicaraguan registry of all four ships was cancelled by Nicaraguan authorities on July 9, 1979. Any confiscation or detainment by the government of Nicaragua which occured after that date would not be excluded from coverage on the ground that Nicaragua was the country of registry.

Although, prior to July 9, title to the *Honduras* was in a Nicaraguan corporation, title to all four ships was transferred on that day to Cayman Islands corporations. In support of its holding that the four ships were owned in Nicaragua, the district court found that the transfer of title was "just a paper sham to obstruct the inevitable confiscation of the vessels by Nicaragua." 521 F.Supp. at 347. In reaching this conclusion, the district court seemed to be influenced in large measure by the lack of proof that any money changed hands, i.e., by the absence of consideration for the contract. It is on that basis that the war

risk insurers seek to justify the district court's finding. However, we find no merit in their argument.

Lack of consideration is available as a defense between parties to an executory contract. It is not grounds for avoiding a contract that has been fully performed. 17 Am.Jur.2d *Contracts* § 86. Where, as here, the parties to a conveyance are satisfied with their bargain, a third person who is not a defrauded creditor of the grantor may not challenge the contract's validity on the basis of alleged insufficient consideration. 37 C.J.S. *Fraudulent Conveyances* § 276. The district court's statement that the Cayman Islands corporations did not acquire good title to the ships, "one that would be recognized in Court as against the new Nicaraguan Government", 521 F.Supp. at 350, is interesting but irrelevant conjecture. The Nicaraguan Government is not a party to this action. See *Pelton v. Westchester Fire Insurance Co.*, 77 N.Y. 605 (1879).

Assuming for the argument that private ownership of the four ships remained at all time within the country of Nicaragua, the district court nonetheless erred in holding that "[t]he losses of the ships were the result of a confiscation by the Nicaraguan government . . . and, therefore, excluded from coverage by the war risk policy",, 521 F.Supp. at 349. When the ships were seized by their crews, the Sandinista rebels were not the "Government" of Nicaragua. After the Sandinistas became the legitimate government, all actions previously taken by it as a rebel government were validated retroactively. *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302–03, 38 S.Ct. 309, 310–11, 62 L.Ed. 726 (1918). Accordingly, if the Sandinistas had chosen to treat the taking of the four vessels by their crews as a seizure or confiscation by the Sandinista government, it might be argued that, under the principle of retroactive validation, the loss was excluded from war risk coverage. The record is devoid, however, of any proof that the Sandinista government chose to ratify the confiscation of the ships, so that *nunc pro tunc* the confiscation became governmental action within the meaning of the insurance policy.

The Sandinista government commenced actions in 1980 against the Cayman Islands corporations as owners of the four vessels

to recover port charges accrued by the ships after they were returned to Nicaragua. Defendants' expert witness. Dr. Ortega, testified that, at the conclusion of those proceedings, the Nicaraguan government "became" the owner of the ships. The bringing of those actions and the sales of the ships to the Sandinista government belie the insurers' assertions that the Nicaraguan government had confiscated the ships in 1979.

Although the Sandinista government had issued a decree on July 20, 1979, authorizing the Attorney General to confiscate "all the assets of the Somoza family, military personnel and officials who have abandoned the country since December, 1977", the record does not indicate that the Attorney General ever issued a confiscation order pursuant to this authority. *Cf. Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401–03, 84 S.Ct. 923, 926–27, 11 L.Ed.2d 804 (1964). Had he done so, the Sandinista government would hardly have named the Cayman Islands corporations as owners and proceeded against them to recover port charges. because the loss of the ships did not result from "[c]apture, seizure, arrest, detainment or confiscation" by the Nicaraguan government, the loss was not excluded under the terms of the war risk policies.

The war risk policy contained the usual "sue and labour" clause. Pursuant to this clause, plaintiffs were obligated to exercise the care of prudent insured owners to protect their property, in order to prevent or minimize loss to the carriers. *Fishing Fleet, Inc. v. Trident Insurance Co.*, 598 F.2d 925, 929 (5th Cir. 1979). The duty is one of reasonable care under all the circumstances and in the light of pertinent commercial and maritime prctices. *Couch on Insurance 2d* § 43:136. It does not require the insured to use all possible care or to follow the wisest course. *Id.* Although the district court did not find a violation of this clause as a basis for its holding, the war risk insurers urge this Court to find such a violation as a basis for affirming. We decline to do so.

The proof shows that both General Somoza and his associate, Joseph Baittiner, were assassinated and that the captain of the *Hope* was stabbed and almost fatally injured in Cuba. Associa-

tion with the deposed Nicaraguan regime apparently was not conducive to longevity. It is undisputed in this case that both Cuba and Panama were opposed to the Somoza government and were actively abetting the Sandinista cause. Their activities in connection with the ship seizures indicated quite clearly that they were not about to hand the ships back to their owners. Mr. Renaldy Gutierrez, a Nicaraguan lawyer, testified that the ships could not have been recovered from Panama or Cuba because of the ships' connection with Somoza. Plaintiffs' agent did petition the Panamanian Ministry of Foreign Affairs for recovery of the three ships detained there, but without success.

The insureds' failure to participate in the *in rem* proceedings for port charges is readily understandable. Assuming that the insureds' representatives could have entered Nicaragua safely, there is no proof that they had timely notice of the proceedings, which was given by publication in a Nicaraguan newspaper of limited circulation. Moreover, the port charges levied against the ships were in excess of the value which the Nicaraguan court placed on the ships. Under these circumstances, plaintiffs' sue and labour activities, although limited, were all that a prudent person would have been expected to undertake.

DISPOSITION

The marine risk insurers are not liable for the loss of the ships, which was due to the civil war in Nicaragua. The judgment as to them is affirmed. The loss was covered by the war risk policies. The judgment in favor of the war risk insurers is reversed, and that portion of the case is remanded to the district court with instructions to enter judgment for plaintiffs, OPE Shipping, Ltd., Vador Shipping, Ltd., Agua Shipping, Ltd. and Duras Shipping, Ltd., against the war risk insurers pursuant to the terms of the war risk policy and the stipulations of the parties.

APPENDIX B

OPE SHIPPING, LTD., and El Porvenir Shipping Co., Inc., Plaintiffs,

v.

ALLSTATE INSURANCE COMPANY, INC., United States Fidelity & Guaranty Companies, Inc., Various British Underwriters and Underwriters at Lloyds, Defendants.

VADOR SHIPPING, LTD., and Cia De Navagacion La Libertad, S. A., Plaintiffs,

v.

ALLSTATE INSURANCE COMPANY, INC., et al., Defendants.

AGUA SHIPPING, LTD., and Cia De Navagacion Corinto, S. A., Plaintiffs,

v.

ALLSTATE INSURANCE COMPANY, INC., et al., Defendants.

DURAS SHIPPING, LTD., and Marina Mercante Nicaraguense, S. A., Plaintiffs,

v.

ALLSTATE INSURANCE COMPANY, INC., et al., Defendants.

Nos. 79 Civ. 5225-5228(MP).
United States District Court,
S. D. New York.
Aug. 31, 1981.

Cichanowicz & Callan, New York City, by Victor S. Cichanowicz, New York City, for plaintiffs.

Hill, Betts & Nash, New York City, by Michael J. Ryan, Frank Loomis, Gregory O'neill, New York City, for defendants Marine Risk Underwriters.

Mendes & Mount, New York City, by Brendan J. Connolly, New York City, for defendants War Risk Underwriters.

MILTON POLLACK, District Judge.

FINDINGS AND OPINIONS

These are admiralty actions seeking recovery from "Marine" and "War Risk" underwriters of the agreed insured value of four commercial vessels which plaintiffs contend and defendants dispute were lost as the result of perils covered by the policies of insurance issued on those vessels. The case was tried to the Court at a Bench trial.

The vessels belonged to General Anastasio Somoza Debayle who carried the title thereto in the names of three wholly-owned Panamanian and one Nicaraguan corporation; all were registered under the Nicaraguan flag until about July 10, 1979. On or about that date Somoza caused the transfer of the nominal title from the three Panamanian and the Nicaraguan corporations to four corporations chartered in the Cayman Islands. The Panamanian, Nicaraguan and Cayman Islands Corporate title holders to the vessels respectively are plaintiffs herein.

The defendants are two separate groups of underwriters. The "Marine Risk" underwriters are Allstate Insurance Company, Inc. (50%); United States Fidelity and Guarantee Company, Inc. (25%); and Various Underwriters at Lloyd's and British Companies (25%); and the "War Risk" underwriters are described herein as Various Underwriters at Lloyds (100%).

Both the marine and war risk policies commenced on May 15, 1979 and were to run for one year. The Allstate policy terminated on July 6, 1979 for non-payment of premiums. The other marine risk policies terminated on July 10, 1979 because of the transfer of the corporate title to the ships. The war risk insurers authorized the assignment of the war risk policy to the Cayman Islands corporations holding the title to the ships. The Cayman Islands corporations were not named in any marine policy issued by any of the defendants. Each vessel was insured at an agreed value of $1,000,000.

The plaintiffs rely on "barratry" in June 1979 as the casualty which overtook the vessels and contend that this is a covered event under the marine policy. Alternatively, plaintiffs contend that the proximate cause of their loss was the Sandinista insur-

rection and rebellion which plaintiffs contend is a covered event under the war risk policy. All four of the ships were taken by members of their crews and diverted to countries friendly with the Sandinistas (the Nicaraguan revolutionary group) in June 1979, before the incorporation and purported transfer of title to the Cayman Islands corporations named herein as plaintiffs.

The evidence convincingly establishes that the proximate cause of loss under the marine policy was the ongoing civil war in Nicaragua, a peril excepted by that insurance. Furthermore, the evidence showed that the property of Somoza and his family, including these vessels, was confiscated by Nicaragua in July 1979, a peril excepted by the war risk insurance. It was those events, not barratry on the part of the crews of the ships, that were the proximate causes of the casualties involved and consequently the plaintiffs herein are not entitled to any recovery from any of the defendants for the reasons more fully stated hereafter.

SUMMARY STATEMENT

It will aid understanding of the somewhat complicated facts to set forth initially a summary statement of the facts which will then be followed by the facts in more detail.

Civil war raged in Nicaragua during 1978 through about July 20, 1978, aimed at deposing the Somoza regime. General Somoza, the dictator of Nicaragua during that period, was the owner of four vessels registered under the Nicaraguan flag which were seized by revolutionaries among the members of the crews during June 1979 and then later turned over to and confiscated by the revolutionary government which came into power in Nicaragua on or about July 20, 1979.

The vessels were taken over by the Sandinista crew members thereof on direct orders from Sandinista authorities as agents of the insurrection and rebellion in Nicaragua against Somoza and the Somoza government. The vessels were then detained and held by Cuba and Panama by way of aiding and abetting the

Sandinista crew members and their Sandinista principals in Nicaragua in furtherance of the goals and in support of the interests of the Sandinistas and were ultimately returned and delivered by such crew members to Nicaragua.

In this lawsuit, the Somoza interests are claiming the insurance under Marine and War Risk policies that were issued covering these vessels.

In June and July 1979 it became increasingly apparent to Somoza that the efforts to drive him from office might succeed. Therefore, although the four vessels were already in hostile hands and beyond Somoza's control, and just before he officially abdicated on July 17, 1979 (but after he had announced that he was quitting), he caused the creation of four Cayman Islands corporations and instructed that the title of the vessels be transferred to them and that the vessels be registered under the flag of the Cayman Islands, a British entity. Through a charade of paper transactions attempting to create the semblance of a "sale" of the vessels to the Cayman Islands corporations, there was a purported transfer of the nominal title and registration of the vessels from the Panamanian and Nicaraguan corporate titles and registrations to the Cayman Islands corporate titles and registrations. No money or other consideration passed and the purpose clearly was to impede and frustrate the inevitable confiscation of the vessels by the revolutionaries. The transfer was a paper sham to hide the continuing Somoza ownership from the revolutionaries and the new government of Nicaragua which contended that Somoza had plundered the government treasury and that Somoza's assets were forfeit to Nicaragua.

Having seemingly assured himself that the purported transfer and other arrangements that he made of his interests were attended to, Somoza stepped down officially from office and fled from Nicaragua. The Junta, the new revolutionary government which took over, promptly passed laws forfeiting Somoza's goods to the State.*

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* Decree No. 3 of the government Junta of National Reconstruction of the Republic of Nicaragua on July 20, 1979 confiscates the property of the Somozas. It reads:

> Article 1. The Attorney General is authorized to immediately proceed with the taking over, requisitioning and confiscation of all the assets of

The history of the last seven week period of civil war prior to Somoza's abdication was detailed in the world press. That history is referrd to hereafter but only for the chronology as a backdrop to better understanding of the evidentiary data in the trial record—a chronology from sources whose accuracy so far as set forth herein cannot reasonably be questioned. See Rule 201, Federal Rules of Evidence.

According to the New York Times (N.Y. Times Index, Nicaragua 1978, 1979, pp. 764-767; 932-35):

2. A so-called Sandinista National Liberation Front undertook activities during 1978 to oust General Somoza; he refused to resign.

2. There was civil strife during most of 1978 in Nicaragua seeking Somoza's resignation, continuing into 1979.

3. On June 1, 1979 a communique to Nicaraguans broadcast by Sandinistas from Costa Rica announced that "The hour for overthrow of President Somoza has arrived" and in connection therewith the Sandinistas called a nationwide (Nicaraguan) strike beginning June 4, 1979 with insurrection to follow soon after. (Je 1, 7:6)

4. On June 4, 1979 Nicaraguans began the general strike aimed at deposing Somoza called by the Sandinist National Liberation Front. Cities not under fire were paralyzed by the general strike aimed at overthrowing Somoza. (Je 4, 7:4; Je 6, 13:3)

5. On June 7, 1979 President Somoza declared a state of siege to help combat the general strike and guerilla war. (Je 7, 3:2)

6. June 14, 1979 Americans were evacuated from Managua to Panama. (Je 14, 1:5)

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the Somoza family, military personnel and officials who have abandoned the country since December 1977;

Once said property has been taken over, requisitioned or confiscated, the Attorney General shall turn over everything that he has done to the competent authorities.

7. June 18, 1979 the Sandinistas name a provisional government of five leaders (a Junta). (Je 18, 1:3)

8. June 22, 1979, American Department of State Secretary Cyrus Vance, at an emergency meeting of the Organization of American States calls for replacement of the Somoza regime; Panama recognizes the provisional government named by the Sandinistas. (Je 22, 1:6)

9. June 24, 1979, the OAS calls for the immediate and definitive replacement in Nicaragua for President Somoza's regime. (Je 24, 1:6)

10. July 5, 1979, Somoza has agreed in principle to step down and to go into exile. (JL 5, 6:1)

11. July 8, 1979, Somoza is negotiating with the provisional Junta; meets Liberal Party leaders and his Cabinet and informs them for the first time of his decision to resign. (JL 8, 1:3)

[July 9, 1979: Somoza goes through the forms of transfer of the nominal titles of his four vessels to his newly-formed Cayman Islands corporations and reregistration thereof in Cayman Islands.]

12. July 10, 1979, five member Junta calls itself the Nicaraguan Government of National Reconstruction. (JL 10, 3:4)

13. July 18, 1979, Somoza resigns and flies to Miami, Florida. (JL 18, 1:1)

14. July 20, 1979, the Sandinistas take control of Nicaragua completing the defeat of National Guard and ending the seven week old war (more than 10,000 people dead). The new government expropriates the entire business empire of Somoza. (JL 20, 1:3)

15. July 24, 1979, the Revolutionary Government announces that it will extradite Somoza and his family and seek recovery of their illicit enrichment. (JL 24, 3:1)

The relevant history of the civil war during that period is also chronicled (in part) in *Productos Carnic, S.A. v. Central Am.*

Beef and Seafood Trdg. Co., 621 F.2d 683 (5th Cir. 1980), a litigation concerning a confiscated Somoza asset.**

In August 1979 the four ships were returned by Panama and Cuba to the government of Nicaragua. They were subsequently sold in a judicial sale to cover expenses that accrued against them while they were anchored in the Nicaraguan harbor. Although there was due publication in the official newspaper, La Gaceta, of the judicial proceedings, no one representing the Nicaraguan, Panamanian or Cayman Islands corporations or General Somoza appeared to contest the sale. No suit was ever filed on behalf of any of the Somoza interests to recover the vessels in Nicaragua, Panama or Cuba. The present suit was filed on September 28, 1979.

The facts in more detail
The Taking of the Ships in June 1979

1. The HOPE (owned by Somoza in the names of El Porvenir Shipping Company, Ltd. and then Ope Shipping Ltd. and chartered during this period to Mamenic Line (Marina Mercante Nicarguense S.A.)

Captain Theodoratos testified that the HOPE was taken by four crew members armed with machine guns and pistols on June 17, 1979. They ordered him to proceed to Cuba and threatened to start to kill the crew if he did not. The four identified themselves as Sandinistas and stated that they had received orders to proceed to Cuba. The HOPE sailed first to Pueerto Nuevita in Cuba. There, Cuban authorities boarded the ship and a Cuban captain sailed it ot Mariel, Cuba. The HOPE remained in Cuba until late August when it was sailed back to Nicaragua.

** "Insurrection, armed conflict, battles in the street, terrorist attacks, riots, war, revolution, and the overthrow of a dictator permeate this appeal. General Anastasio Somoza was forced to resign as President of Nicaragua on July 17, 1979. The new government promptly nationalized a great portion of the vast holdings of Somoza and his family, including a small Nicaraguan meat processing company—already close to bankruptcy—Productos Carnic, S.A." *Id.* at 685.

The insurance agent for the four ships, Moreno, telexed American Marine Underwriters that the HOPE was "taken over by Sandinista Elements of crew and put into Cuban port of Refuse . . . where presently detained."

2. The EL SALVADOR (Owned by Somoza in the names of Cia de Navegacion La Libertad, S.A. and then Vador Shipping, Ltd. and chartered during this period to Mamenic Line.)

Captain Nichols testified that the ship was in Canal Zone waters on June 22, 1979. While he was ashore, the ship was removed to Panamanian waters and delivered to the Panamian Maritime National Guard. He was not permitted to go aboard except to pick up his belongings. He was told by the Chief Mate that five crew members armed with knives had ordered the ship moved into Panamanian waters. These five identified themselves as representatives of the Sandinistas and hoisted the Sandinista flag.

Moreno notified the marine risk insurers that the vessel was "detained" by "Panamanian Authorities".

3. The HONDURAS (Owned by Somoza in the name of Mamenic Line, viz, Marina Mercante Nicaraguense, S.A. and then Duras Shipping Ltd.)

Fausto Amador, former general manager of Mamenic Line, testified that he was notified by Mamenic's agents in Balboa that the ship had been taken from the Canal Zone into Panamanian waters by the crew and delivered to Panamanian authorities. Moreno notified the marine risk insurers that the ship was "detained" by "Panamanian authorities".

4. TheMANAGUA (Owned by Somoza in the names of Cia de Navegacion Corinto, S.A. and then Agua Shipping Ltd. and chartered during this period to Mamenic Line.)

Albert Griffith, general agent of Mamenic Line in El Salvador, testified that the MANAGUIA was anchored in Acajutla, El Salvador and he was instructed by his principals to hold the ship in port until further instructions were received. Despite Griffith's instructions not to allow the ship to leave port, it

managed to slip out leaving behind a portion of the crew. The crew members who were left behind did not wish to be sent back to Nicaragua. Moreno notified the marine risk insurers that the MANAGUA was "detained" in Panama.

The Transfer of the Corporate Titles and Registrations of the Ships

On June 24, 1979, General Somoza wrote to Mr. Joseph Baittiner, his long-term business associate, advising him that the EL SALVADOR and HONDURAS were in Panama. He wrote on Mamenic Line stationery in his capacity as president of the corporation. He instructed Baittiner to take such action as he deemed necessary to protect all vessels owned or chartered by Mamenic Line including transferring them to new corporations under the jurisdiction and flay of other countries, changing their name and assigning all insurance policies. Somoza reconfirmed these instructions on June 28 when he wrote Baittiner advising him that the HOPE was in Cuba and that the MANAGUA might be going to Panama.

Baittiner traveled to Panama in late June or early July and saw the ships. He made no effort, however, to reclaim possession. He told an American lawyer who was in Panama arranging to have the cargo on two of the Somoza ships removed that he felt it would be too costly and time-consuming to attempt to regain possession. He said that the best thing to do was to leave them in Panama.

Having decided not to try to regain possession of the ships, Baittiner chose instead to arrange for a sham transfer of title to the four Cayman Islands shell corporations. To this end, Baittiner communicated with Truman A. Skinner, an attorney in Miami, in May or June of 1979 and asked him to draw up the appropriate papers. The papers prepared in connection with the "transfer" in Miami include minutes of a "Special Meeting of Shareholders" of the Panamanian corporations purportedly selling the HOPE, MANAGUA and EL SALVADOR. Mr. Skinner acted as the so-called "President ad-hoc." Rose Mendez, a sec-

retary in Mr. Skinner's law firm, acted as the "Secretary ad-hoc." Skinner and Mendez were listed as the sole shareholders of the three Panamanian corporations.

Not only does Mrs. Mendez appear as a so-called "shareholder" of the Panamanian corporations, she is also referred to as "Assistant Secretary" in resolutions of the Cayman Islands corporations granting powers of attorney to Baittiner to "purchase" the vessels for the Cayman Islands corporations. Mr. Skinner testified that Baittiner appointed Mrs. Mendez as "Assistant Secretary" of those corporations. The ubiquitous Mrs. Mendez also functioned as a notary public. Powers of attorney to "sell" the vessels were given to Julio Somoza, a son of General Somoza.

With respect to the HONDURAS, owned by Mamenic Line, the "document of sale" is a notarial document prepared by Renaldy Gutierrez, a notary public and occcasional attorney for Mamenic Line who succeeded Mr. Baittiner as President of the four Cayman Islands corporations after Mr. Baittiner's assassination. Mr. Baittiner was the nominal "purchaser" of the HONDURAS.

Mr. Skinner's law firm billed General Somoza for the services performed in conjunction with the preparation of the papers and transactions done in Miami.

The papers for these transfers were completed in Miami on July 9, 1979 and immediately taken to Managua by Gutierrez. On July 13, 1979 the vessels were registered under the British flag in the Cayman Islands. There is no claim of any payment of any consideration for the transfers and no witness saw any money pass.

On July 14, 1979 Mr. Baittiner reported his doings to General Somoza, advising him of the transfer of the vessels to corporations under Cayman Islands flag.

Somoza's attempt to mask his actual and continued beneficial ownership of the four vessels by that series of paper transactions did not serve to put the ships beyond the reach of Nicaragua from which he was preparing to and did flee. He had already

announced prior thereto that he would resign and thereafter instructed his agents to go through the forms of a sale and transfer of the vessels, their Nicaraguan deregistration and reregistration in Cayman Islands. No new ownership in fact was created—there was no bona fide sale—the whole of these maneuvers was just a paper sham to obstruct the inevitable confiscation of the vessels by Nicaragua—and they are not entitled to any legal effect for purposes hereof. During this entire period the vessels were under charter to Mamenic Line which was also nationalized as soon as Somoza resigned and fled.

The trial testimony was: that these four vessels belonged to Somoza; that the new government took the position that everything that belonged to Somoza previously belonged to Nicaragua under the expropriation order; that the purported transfers of the titles in July were of no effect and were not recognized by the new government: and that the purported Cayman Islands title-holders have made no claims to the vessels allegedly because they would have been futile—there was no chance of success. A decree was passed by Nicaragua in August or September, 1979 which authorized anyone who was or felt injured by the actions of the government to assert their claims; however, this would have required the admission that Somoza was requesting the property and a claim by Somoza would have been futile. It was further testified that at all events the four vessels are in Nicaragua under the control of the Nicaraguan government and being held by it because they were Somoza's property. The Nicaraguan government is a government recognized by the United States.

Finally, in the last minute scurrying by Somoza's numerous agents to try to save Somoza's assets from confiscation by the Sandinistas, one element of the paper shuffle may have been overlooked. Mamenic Line was the bareboat charterer of the EL SALVADOR, the HOPE and the MANAGUA as well as the owner of the HONDURAS. In the rush to prepare all the documents necessary for the pruported sale of the four ships, the documents necessary for termination of the Nicaraguan bareboat charters may never have been prepared. Amidst the abundance of documents introduced into evidence by plaintiffs,

the cancellations of the charters are conspicuously absent. Fausto Amador, the manager of Mamenic Line, and a long-time and devoted employee of Somoza's testified that he signed cancellation documents, but it is notable and suspicious and tends to cast doubt on his testimony, that these are the only documents which were not carefully shuttled back from Managua to Miami by Mr. Gutierrez just before the fall of the Somoza regime. Thus, there is some likelihood that the transfer of title, itself a sham, was ineffective even by its own devices. If Mamenic Line remained the bare boat charterer after the transfer of title, Mamenic Line had legal rights to the possession of the four ships even after the transfer of title. When Mamenic Line was nationalized by the Sandinista Government its right to possession transferred to the new government which then confiscated the ships as an Act of State.

The Insurance Coverage

The marine (hull) risk insurance covers the perils of "barratry of the Master and Mariners" . . . "excepting, however, such of the foregoing perils as may be excluded by provisions elsewhere in the Policy or by the endorsement thereon". Under the head of WAR, STRIKES AND RELATED EXCLUSIONS the policy reads "This policy does not cover any loss, damage or expense caused by, resulting from or incurred as a consequence of:

> (e) civil war, revolution, rebellion, insurrection or civil strife arising therefrom. . .

The War Risks Clauses include insurance coverage to cover "only those risks which would be covered by the attached Policy (including collision liability) in the absence of the War, Strikes, and Related Exclusions Clause, However, under EXCLUSIONS it is provided that

> This insurance does not cover any loss, damage or expense caused by, resulting from, or incurred as a consequence of:

> (f) capture, seizure, arrest, restraint, detainment, or confiscation by the Government of the United States or of the country in which the Vessel is owned or registered.

Liability of the Marine Risk Insurers

The Marine policy covers barratry. The classic definition of barratry was given by Lord Ellenborough in *Earle v. Rowcraft*, 8 E. 126, 138 (1806), as follows:

> . . . a fraudulent breach of duty by the Master, in respect to his owners; or, in other words, a breach of duty in respect to his owners with a criminal intent, or *ex maleficio*, is barratry.

In the *Republic of China v. National Union Fire Insurance Co. of Pittsburgh*, 151 F.Supp. 211 (D.Md. 1957), *aff'd in part and rev'd in part*, 254 F.2d 177 (4th Cir. 1958), *cert. denied*, 358 U.S. 823, 79 S.Ct. 38, 3 L.Ed.2d 64 (1958) Chief Judge Thomsen stated at p. 227:

> If the Captain deviates, or is compelled by the crew to deviate the vessel from its proper course and to put into an unauthorized port in fraud of his or their duty to owners, it is barratry.

Thus, if the loss herein was caused by barratry, plaintiffs are entitled to prevail. The marine underwriters contend that the loss was caused by civil war which is not covered by their policy, but is an excluded risk. There is little doubt that barratry, as it is classically defined, occurred and contributed to the loss of the ships. The barratry would not have occurred, however, but for the civil war. The real underlying cause of the loss of the ships was the civil war in Nicaragua. Loss resulting from civil war is noto covered by the marine policy.

In *Republic of China, supra*, it was held that the loss, though brought about by barratry, was a consequence of civil war and hence was not covered by the marine risk policy. The Court

held that the F.C.&S. Clause "excludes from the coverage of the marine risk policy any barratry which is a consequence of civil war", . . . 151 F.Supp. 211, 235.

The loss of the four Somoza ships was "incurred as a consequence of civil war."

> [I]n accord with the reasonable understandings and expectations of the parties, we must attempt to ascertain what the Supreme Court has referred to as the "predominant and determining" or the "real efficient" cause of the loss. See, e.g. *Standard Oil Co. of New Jersey v. United States*, 340 U.S. 54, 58, 71 S.Ct. 135 [137], 95 L.Ed. 68 (1950); Determination of the proximate cause in these cases is thus a matter of applying common sense and reasonable judgment as to the source of the loss alleged. *Blaine Richards & Co. v. Marine Indemnity Insurance Co.*, 635 F.2d 1051, 1054 (2d Cir. 1980).

In *Pan American World Airways, Inc. v. Aetna Casualty and Surety*, 505 F.2d 989, 1017 (2d Cir. 1974) the term "civil war" was explained as follows

> "Insurrection" presents the key issue because "rebellion", "revolution," and "civil war" are progressive stages in the development of civil unrest, the most rudimentary form of which is "insurrection."

An insurrection is "a movement accompanied by actions specifically intended to overthrow the constituted government and to take possession of the inherent powers thereof . . . if the insurrection or rebellion proceeds to the attainment of its objective, viz., the overthrow of the old constituted government and the establishment of a new one in its place, then the movement, retroactively will be dignified by the characterization of a 'revolution' " *Home Insurance Co. of New York v. Davila*, 212 F.2d 731, 736 (2d Cir. 1954).

Liability of the War Risk Insurers

The war risk insurers deny coverage under their policy claiming that the loss is excluded because it is a "capture, seizure, arrest, restraint, detainment or confiscation by . . . the country in which the vessel is owned or registered". (Emphasis added).

Somoza's attempt to transfer the corporate titles and registrations of the four ships in order to avoid the effect of this clause was ineffective and a sham. The ships had already been taken from Somoza's possession by the Sandinistas when this attempt was made. As the Privy Council noted in *Civil Transport Incorporated v. Central Air Transport Corporation* (1953) A.C. 70, 2 Lloyd's Reg. 209 (Privy Council)

> Subsequent recognition de jure of a new government [the Sandinista Government] as the result of successful insurrection can in certain cases annul a sale of goods by a previous government [Somoza]. If the previous government [Somoza] sells goods which belong to it but are situated in territory effectively occupied at the time by insurgent forces action on behalf of what is already a de facto new government, the sale may be valid if the insurgents are afterwards defeated and possession of the goods is regained by the old government. But if the old government [Somoza] never regains the goods and the de facto new government becomes recognized . . . as the de jure government, purchasers from the old government [Somoza] will not be held in her Majesty's courts to have a good title after that recognition. *Id.* at 93.

The agents of the de facto Sandinista Government took control of the ships in June, 1979 and delivered them for safekeeping to two nations, Panama and Cuba which recognized the Sandinista Junta as the legitimate government of Nicaragua. Somoza purported to transfer the title to the ships after they were seized by the Sandinistas. Somoza never regained the goods and the Sandinistas replaced him in power and replaced Somoza as the recognized de jure government. The purported transferee of the titles to the ships did not acquire good title, one that would be recognized in Court as against the new Nicaraguan Government. The nominal titles in which the ships were registered were at all times representative of Somoza's ownership in fact, an ownership that was and remained subject to Nicaragua. The paper charade engaged in by Somoza can be seen as nothing more than an attempt to evade factors involved

in the exclusions of the war risk policy. It is unlikely that the plaintiffs expected to enchance their chances of reclaiming the ships by their maneuvers. Their subsequent inaction—failure to assert any claim to the ships—supports this view. Mr. Baittiner's statement that it would be too time-consuming and expensive to sue for recovery of the ships in Panama is damning.

The complaints in these actions are dismissed and judgment in each case is to be entered in favor of the defendants.

The foregoing shall constitute the findings of fact and conclusions of law required by Rule 52(a), Federal Rules of Civil Procedure.

So Ordered.

APPENDIX C

UNITED STATES SUPREME COURT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the Fifth day of November, one thousand nine hundred and eighty-two.

No. 81-7701

OPE SHIPPING, LTD and EL PORVENIR SHIPPING COMPANY, INC.,
Plaintiffs-Appellants,

—v—

ALLSTATE INSURANCE COMPANY, INC., UNITED STATES FIDELITY & GUARANTY COMPANIES, INC., VARIOUS BRITISH Underwriters and UNDERWRITERS AT LLOYDS,
Defendants-Appellees.

VADOR SHIPPING, LTD., and CIA. DE NAVEGACION LA LIBERTAD, S.A.,
Plaintiffs-Appellants,

—v—

ALLSTATE INSURANCE COMPANY, INC., UNITED STATES FIDELITY & GUARANTY COMPANIES, INC., VARIOUS BRITISH Underwriters and UNDERWRITERS AT LLOYDS,
Defendants-Appellees.

AGUA SHIPPING, LTD., and CIA. DE NAVEGACION CORINTO, S.A.,

—v—

ALLSTATE INSURANCE COMPANY, INC., UNITED STATES FIDELITY & GUARANTY COMPANIES, INC., VARIOUS BRITISH Underwriters and UNDERWRITERS AT LLOYDS,
Defendants-Appellees.

DURAS SHIPPING, LTD., and MARINA MERCANTE NICARAGUENSE, S.A.,

Plaintiffs-Appellants,

–v–

ALLSTATE INSURANCE COMPANY, INC., UNITED STATES FIDELITY & GUARANTY COMPANIES, INC., VARIOUS BRITISH Underwriters and UNDERWRITERS AT LLOYDS,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the motion be reheard in banc having been filed herein by counsel for the defendant-appellee, War Risk Underwriters,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by:

_____

Francis X. Gindhart

Chief Deputy Clerk

APPENDIX D

A Marina Mercante Nicargüense, S.A.
Mamenic Line
Managua, D.N., Nicaragua, America Central
CABLE: MAMENIC TELEF. 26/01
APDO. 3523 TELEX No. 1011

Plaintiff's Exhibit
U.S. Dist. Court
S.D. of N.Y.
Ex. 34

June 24, 1979

Mr. Josèph P. Baittiner
Bogotá, Colombia

Dear Mr. Baittner:

I am informed that the EL SALVADOR and HONDURAS, which were seized by their crews, are in Panamá.

As per our telephone conversation, please proceed to Panama at once and take whatever actions you can to recover the vessels.

I view that it appears that Panama may no longer protect the intersts or assets of corporations formed in Panama, this letter serves to confirm the previous verbal instructions given to you to take such actions as you deem necessary tc protect all vessels owned or chartered by this corporation or in which it has an interest, including transferring them subject to any mortgages to new corporations under the jurisdiction and flag of other countries, changing their names and assigning all insurance policies to such new corporations as appropriate.

Very truly yours,
MARINA MERCANTE NICARAGUENSE, S.A.
by
ANASTASIO SOMOZA DEBAYLE
President

A Marina Mercante Nicargüense, S.A.
Mamenic Line
Managua, D.N., Nicaragua, America Central
CABLE: MAMENIC TELEF. 26/01
APDO. 3523 TELEX No. 1011

Plaintiff's Exhibit
U.S. Dist. Court
S.D. of N.Y.
Ex. 35

June 28, 1979

Mr. Joseph P. Baittiner
Bogotá, Colombia

Dear Mr. Baittiner:

As per our telephone conversation, I have now learned that the HOPE, which was also seized by her crew, is in Cuba. The MANAGUA has also disappeared and may be going to Panama. I have no information about the Costa Rica.

Please proceed with the previous verbal and written instructions given to you.

Very truly yours,

MARINA MERCANTE NICARAGUENSE, S.A.

by

ANASTASIO SOMOZA DEBAYLE
President

APPENDIX E

American Institute
Hull War Risks and Strikes Clauses
(Including Automatic Termination and Cancellation Provisions)
For Attachment to American Institute Hull Clauses
December 1, 1977

To be attached to and form a part of Policy No. 01/145005 of the Lloyd's

This insurance, subject to the exclusions set forth herein, covers only those risks which would be covered by the attached Policy (including collision liability) in the absence of the WAR, STRIKES AND RELATED EXCLUSIONS clause contained therein but which are excluded thereby and which risks shall be construed as also including:

1. Any mine, bomb or torpedo not carried as cargo on board the Vessel;

2. Any weapon or war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter;

3. Civil war, revolution, rebellion, insurrection, or civil strife arising therefrom;

4. Strikes, lockouts, political or labor disturbances, civil commotions, riots, martial law, military or usurped power;

5. Malicious acts or vandalism to the extent only that such risks are not covered by the attached Policy;

6. Hostilities or warlike operations (whether there be a declaration of war or not) but this paragraph (6) shall not include collision or contact with aircraft, rockets or similar missiles, or with any fixed or floating object, or stranding, heavy weather, fire or explosion unless caused directly by a hostile act by or

against a belligerent power which act is independent of the nature of the voyage or service which the Vessel concerned or, in the case of a collision, any other vessel involved therein, is performing. As used herein, "power" includes any authority maintaining naval, military or air forces in association with a power.

EXCLUSIONS

This insurance does not cover any loss, damage or expense caused by, resulting from, or incurred as a consequence of:

a. Any hostile detonation of any weapon described above in paragraph (2):

b. Outbreak of war (whether there be a declaration of war or not) between any of the following countries: United States of America, United Kingdom, France, the Union of Soviet Socialist Republics or the People's Republic of China;

c. Delay or demurrage;

d. Requisition or preemption;

e. Arrest, restraint or detainment under customs or quarantine regulations and similar arrests, restraints or detainments not arising from actual or impending hostilities;

f. Capture, seizure, arrest, restraint, detainment, or confiscation by the Government of the United States or of the country in which the Vessel is owned or registered.

HELD COVERED AND OTHER PROVISIONS

The held covered clause appearing under the heading ADVENTURE in the attached Policy is deleted and the following clause substituted therefore:—

> "Subject to the provisions of the Automatic Termination and Cancellation Clauses below, held covered in the event of any breach of conditions as to loading or discharging of cargo at sea, or towage or salvage activities provided (a) notice is given to the Underwriters immediately following

receipt of knowledge thereof by the Assured, and (b) any amended terms of cover and any additional premium required by the Underwriters are agreed to by the Assured."

If at the natural expiry time of this insurance the Vessel is at sea, this insurance will be extended, provided previous notice be given to the Underwriters, for an additional premium at a rate to be named by the Underwriters, until midnight Local Time of the day on which the Vessel enters the next port to which she proceeds and for 24 hours thereafter, but in no event shall such extension affect or postpone the operation of the Automatic Termination and Cancellation Clauses below.

Warranted not to abandon in case of capture, seizure or detention, until after condemnation of the property insured.

The provisions of the attached Policy with respect to constructive Total Loss shall apply only to claims arising from physical damage to the Vessel.

AUTOMATIC TERMINATION AND CANCELLATION CLAUSES

A. This insurance and any extention thereof, unless sooner terminated by the provisions of section B or C, shall terminate automatically upon and simultaneously with the occurrence of any hostile detonation of any nuclear weapon of war as defined above, wheresoever or whensoever such detonation may occur and whether or not the Vessel may be involved.

B. This insurance and any extension thereof, unless sooner terminated by the provisions of section A or C, shall terminate automatically upon and simultaneously with the outbreak of war, whether there by a declaration of war or not, between any of the following countries: United States of America, United Kingdon, France, the Union of Soviet Socialist Republics or the People's Republic of China.

C. This insurance and any extension thereof, unless sooner terminated by section A or B, shall terminate automatically if and when the Vessel is requisitioned, either for title or use.

D. This insurance and any extension thereof may be cancelled at any time at the Assured's request, or by Underwriters upon 14 days' written notice being given to the Assured, but in no event shall such cancellation affect or postpone the operation of the provisions of sections A, B or C. Written or telegraphic notice sent to the Assured at his (its) last known address shall constitute a complete notice of cancellation and such notice mailed or telegraphed to the said Assured, care of the broker who negotiated this insurance, shall have the same effect as if sent to the said Assured direct. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date and hour of cancellation shall be 14 days from midnight Local Time of the day on which such notice was mailed or telegraphed as aforesaid. Underwriters agree, however, to reinstate this insurance subject to agreement between Underwriters and the Assured prior to the effective date and hour of such cancellation as to new rate of premium and/or conditions and/or warranties.

RETURNS OF PREMIUM

The RETURNS OF PREMIUM clause of the attached Policy is deleted and the following substituted therefore:—

> "In the event of an automatic termination or cancellation of this insurance under the provisions of sections A, B, C or D above, or if the Vessel be sold pro rata net return of premium will be payable to the Assured, provided always that a Total Loss of the Vessel has not occurred during the currency of this Policy. In no other event shall there by any return of premium."

THIS INSURANCE SHALL NOT BECOME EFFECTIVE IF, PRIOR TO THE INTENDED TIME OF ITS ATTACHMENT, THERE HAS OCCURRED ANY EVENT WHICH WOULD HAVE AUTOMATICALLY TERMINATED THIS INSURANCE UNDER THE PROVISIONS OF SECTIONS A, B, OR C HEREOF HAD THIS INSURANCE ATTACHED PRIOR TO SUCH OCCURRENCE.

APPENDIX F

CONFISCATION OF PROPERTY

Decree No. 3

THE GOVERNMENT JUNTA OF NATIONAL RECONSTRUCTION OF THE REPUBLIC OF NICARAGUA

Making use of its powers,

Renders the following decree:

Article 1. The Attorney General is authorized to immediately proceed with the taking over, requisitioning and confiscation of all assets of the Somoza family, military personnel and officials who have abandoned the country since December 1977;

Once said property has been taken over, requisitioned or confiscated, the Attorney General shall turn over everything that he has done to the competent authorities.

Article 2. The present law shall enter into effect today as from the time of its publication by any means of collective communication, without prejudice to its subsequent publication in the Diario Oficial (Official Gazette).

Managua, July 20, 1979—"Year of National Liberation"

GOVERNMENT JUNTA OF NATIONAL RECONSTRUCTION

Violeta B. de Chamorro – Sergio Ramirez Mercado – Moises Hassan M. – Alfonso Robelo Callejas – Daniel Ortega Saavedra.

APPENDIX G

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 81-7701

OPE SHIPPING, LTD. *et ano.*,
Plaintiffs-Appellants,

–against–

ALLSTATE INSURANCE COMPANY, INC., *et al.*,
Defendants-Appellees.

PLAINTIFFS-APPELLANTS' AFFIDAVIT IN OPPOSITION TO DEFENDANTS-APPELLEES, WAR RISK UNDERWRITERS' MOTION FOR LEAVE TO FILE A RENEWED PETITION FOR REHEARING.

STATE OF NEW YORK)
) SS.:
COUNTRY OF NEW YORK)

VICTOR S. CICHANOWICZ, being duly sworn, deposes and says:

1. I am an attorney at law admitted to practice before this Court, and a member of the firm of Cichanowicz & Callan, attorneys for plaintiffs-appellants, OPE SHIPPING, LTD., VADOR SHIPPING, LTD., AGUA SHIPPING, LTD. and DURAS SHIPPING, Ltd., in the above captioned matter. I submit this affidavit in opposition to defendants-appellees WAR RISK UNDERWRITER motion for leave to file a *renewed* petition for rehearing.

2. Plaintiffs-appellants oppose the motion on two grounds. First, neither Fed.R.App.P. 40 nor any other federal rule or statute makes any provision for *renewal* of a petition for rehearing. Second, the argument raised by the WAR RISK Underwriters in their application to renew was also raised by them on pages 3 and 8 of their September 13, 1982 petition for rehearing with suggestion for *in banc* consideration and was rejected by this Court on or about November 5, 1982.

3. It should be noted that the defendants-appellees, WAR RISK UNDERWRITERS, have taken a portion of the Court's August 30, 1982 decision completely out of context. The Court did not say that two of the vessels were detained *by* Panama as the WAR RISK UNDERWRITERS allege in paragraph 2 of their moving affidavit. What the Court said was:

> Plaintiffs' agent did petition the Panamanian Ministry of Foreign Affairs for recovery of the three ships *detained there*, but without success.

687 F.2d 639, 644 [Emphasis added].

A reading of the decision clearly shows that this Court never found a detention by the Panamanian government within the meaning of the war risk policy exclusions nor, for that matter, did the district court. What this Court did hold is that the loss of the vessels was caused by their prior unlawful taking by the respective crews and not by anything that happened in Panama. See, 687 F.2d 639, 642 *et seq.*"

4. We submit that counsel's persistence in arguing a point so clearly without merit, and one which this Court has already considered and rejected on defendants-appellees' petition for rehearing leads unavoidably to the conclusion that this application is being made in bad faith solely for the purposes of delay.

WHEREFORE, plaintiffs-appellants respectfully request that the motion be denied.

Sworn to before me
on November 30, 1982

VICTOR S. CICHANOWICZ
JOSEPH P. DE MAY, JR.
Notary Public State of New York
No. 41-4698900
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 19___.